IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

AMICA CENTER FOR IMMIGRANT RIGHTS *et al.*, *Plaintiffs*, v. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW *et al.*, *Defendants*.	Case No.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR A STAY UNDER 5 U.S.C. § 705

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INTRODUCTION

This case challenges an interim final rule that—in the vast majority of cases—will eliminate access to appellate review before the Board of Immigration Appeals (BIA). *See Appellate Procedures for the Board of Immigration Appeals*, 91 Fed. Reg. 5,267 (Feb. 6, 2026) (IFR). For the few cases that do get consideration on the merits, the IFR truncates review timelines and briefing opportunities, substantially diminishing the BIA's role in ensuring the fundamental fairness of immigration removal proceedings. But despite these substantial changes, and the significant harms the IFR does to both individuals in removal proceedings and organizations that support them, Defendants rushed to issue it on February 6, 2026, with no prior notice and no pre-implementation opportunity to have comments considered. The IFR will take effect on March 9, 2026.

The IFR systematically disadvantages noncitizens seeking to establish their entitlement to relief and will inevitably result in the wrongful removal of noncitizens—including to places where they will be persecuted or worse—even when they have meritorious claims for relief. It also makes the work of Plaintiffs, who are legal services organizations that seek to represent or otherwise assist noncitizens in that process, monumentally more difficult and in many cases impossible. If the IFR takes effect, it will make Plaintiffs' work of ensuring access to a full and fair process much more difficult and time consuming in each case, which will require Plaintiffs to expend more resources serving fewer individuals. Indeed, the harms inflicted by the IFR are exacerbated by their interaction with multiple other actions Defendants have taken in recent months to make access to a full and fair hearing before an immigration judge exponentially more difficult. Defendants' changes, which significantly heighten the risk of erroneous outcomes and unfair proceedings before the immigration judge, make the right to appeal to the BIA all the more critical. Yet the challenged IFR will eliminate BIA review in most cases—review that is mandated by Congress—thereby insulating ongoing violations of noncitizens' due process and statutory rights in immigration courts from correction on appeal.

The IFR violates the procedural and substantive requirements of the Administrative

Procedure Act (APA) and must be vacated. *First*, the IFR was promulgated without required notice-and-comment rulemaking. *Second*, the IFR is contrary to law because it eviscerates multiple statutory requirements that protect the rights of noncitizens that are enshrined in the Immigration and Nationality Act (INA). *Third*, the IFR is arbitrary and capricious because it kneecaps the BIA's role as an appellate body, and it does so without considering multiple important aspects of the problem, relies on erroneous data and assumptions, ignores reliance interests and the evidence before the agency, and fails to grapple with the fundamental due process problems the IFR causes.

Because Plaintiffs face irreparable harm absent a stay, are likely to succeed on the merits of their claims, and satisfy the other criteria for preliminary relief, this Court should postpone the effective date of the IFR under 5 U.S.C. § 705. Because the IFR will otherwise take effect on March 9, 2026, Plaintiffs respectfully request a ruling by that date.

BACKGROUND

I. Immigration Court Proceedings and BIA Appeals

Immigration law is well known for both its complexity and the severe consequences that can flow from removal. *See, e.g.*, *Ardestani v. INS*, 502 U.S. 129, 138 (1991); *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("[D]eportation is a particularly severe 'penalty.'" (citation omitted)); *Nken v. Holder*, 556 U.S. 418, 436 (2009) (public interest in preventing wrongful removals, "particularly to countries where [noncitizens] are likely to face substantial harm.").

In the face of these complexities, the INA offers certain basic protections. When DHS wishes to remove a noncitizen, subject to exceptions not relevant here, it must obtain an order of removal from an Immigration Judge (IJ), who is charged with conducting removal proceedings, finding facts, and granting relief or ordering removal. *See* 8 U.S.C. §§ 1229a(a)(1), (c)(1)(A).

The Executive Office for Immigration Review (EOIR) is an agency within the U.S. Department of Justice (DOJ) that oversees the immigration courts and the BIA. *See* 8 C.F.R. § 1003.0; *see also* EOIR, *About the Office*, https://perma.cc/SH44-T4A3 (last visited Feb. 26, 2026). After Defendants fired more than 100 IJs in mid-2025, there are currently 520 permanent immigration judges and 33 assistant chief immigration judges in 73 courts nationwide. Anusha

Mathur et al., *U.S. has a quarter fewer immigration judges than it did a year ago. Here's why*, NPR (Feb. 23, 2026), https://perma.cc/9APF-ZVT9. Defendants have vastly lowered the standards and expertise needed to serve as an IJ; EOIR no longer requires temporary IJs to have any immigration law experience, *see* Designation of Temporary Immigration Judges, 90 Fed. Reg. 41,883 (Aug. 28, 2025), and provides only three weeks' training to new temporary IJs, in which they are told to deny asylum applications in most cases, *see* Celine Castronuovo, *Trump Immigration Judges Pushed to Deny Asylum in Swift Training*, Bloomberg Law (Feb. 4, 2026), https://perma.cc/ZJ9U-YAUL. EOIR has also increased its reliance on temporary IJs. *See* EOIR, *Notice: EOIR Announces 6 Immigration Judges and 27 Temporary Immigration Judges* (Feb. 5, 2026), https://perma.cc/E392-Y7P2.

Under the INA, noncitizens are entitled to legal representation of their own "choosing," but "at no expense to the Government." 8 U.S.C. §§ 1229a(b)(4)(A), 1362. The INA recognizes the significant role legal representation plays in the process. *See, e.g.*, *id.* §§ 1158(d)(4) (requiring the government to advise asylum applicants "of the privilege of being represented by counsel" and to provide them with an updated list of people "who have indicated their availability to represent [noncitizens] in asylum proceedings on a pro bono basis"); 1229(a)(1) (providing that noncitizens "may" be represented by counsel and that they "will be provided (i) a period of time to secure counsel"); 1229(b)(2) (requiring the government to provide lists to noncitizens of pro bono legal services providers); 1228(a)(2) (requiring that, in the case of noncitizens facing removal based on certain convictions, "the Attorney General shall make reasonable efforts to ensure that the [noncitizen's] access to counsel and right to counsel under section 1362 of this title are not impaired"). But most noncitizens, and many detained in DHS custody, nevertheless proceed pro se, *see* TRAC Immigration, *Pending Court Cases by Immigrant's Address* (Sept. 2025), https://perma.cc/R6ZM-5T87.

In addition to the right to representation, noncitizens in removal proceedings have multiple other statutory rights including "a reasonable opportunity to examine the evidence," an opportunity "to present evidence," and an option "to cross-examine witnesses presented by the Government."

8 U.S.C. § 1229a(b)(4)(B). Further, "a complete record shall be kept" of removal proceedings. *Id.* § 1229a(b)(4)(C). EOIR has an electronic filing system, called the EOIR Courts & Appeals System (ECAS), but older cases with paper files and many pro se cases require paper filings by mail. *See* 8 C.F.R. §§ 1003.2(g)(4), 1003.3(g)(1); *see also* EOIR Policy Manual, Part III, Ch. 2.1(a)(3), (6). EOIR requires filings to be *received* by the deadline, regardless of the method of filing. *See* EOIR Policy Manual, Part III, Ch. 2.1(a)(1).

IJ decisions are appealable, first to the BIA and then, if a proceeding results in a removal order, to federal courts of appeals. An IJ's decision "shall become final upon the earlier of (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the [noncitizen] is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47). Judicial review of administratively final removal orders before the courts of appeals is governed by 8 U.S.C. § 1252. Section 1252(a)(5) provides that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." 8 U.S.C. § 1252(a)(5). Such a petition is due no later than "30 days after the date of the final order of removal," and it "shall" be filed with a copy of the underlying agency decision. *Id.* §§ 1252(b)(1); 1252(c)(1).

BIA practice has long been governed by regulations. *See generally* 8 C.F.R. § 1003 *et seq.* The appealing party—the noncitizen or the government—has 30 days to file a Notice of Appeal with the BIA from an adverse decision by an IJ. 8 C.F.R. § 1003.3(a). Appeals by noncitizens currently cost $1,030, and the Notice of Appeal must be accompanied by the fee or a fee waiver request. 8 U.S.C. § 1812(d); EOIR, *Types of Appeals, Motions, and Required Fees* (Feb. 18, 2026), https://perma.cc/H4Z3-YSQY. The 30-day clock begins to run from the date the IJ issues a decision, orally or in writing. 8 C.F.R. § 1003.38(b) (2021). Under current regulations, appeals are initially screened and can be dismissed only "after completion of the record of proceeding." *Id.* §§ 1003.1(e)(1), (e)(3). Summary dismissal is permissible only in highly limited circumstances, such as where a party fails to specify the reasons for the appeal or where the appeal was filed for

an improper purpose, was untimely, or does not fall within the Board's jurisdiction. *Id*. § 1003.1(d)(2).

Currently, after a party files a Notice of Appeal, the BIA issues a briefing schedule accompanied by a transcript of the proceedings, which in most cases would include a transcription of the IJ's oral decision; in the rare case where the IJ issued a written decision, it would also be attached to the schedule. *Id.* § 1003.3(c)(1); Ex. C, Koop Decl. ¶ 53 (explaining that most IJ decisions are oral). There is no set timetable for the BIA to issue these materials. From the date the BIA issues the schedule, the parties have 21 days to file their briefs. The briefing schedule is consecutive for non-detained litigants (*i.e.*, appellant files a brief and appellee responds) and concurrent (*i.e.* simultaneous) when the noncitizen is detained. *Id.* § 1003.3(c)(1). The BIA routinely grants one extension of this deadline. *See id.* § 1003.3(c)(1). A party may move for the BIA to accept a reply brief if they assert surprise at the opposing party's assertions. *See* EOIR Policy Manual, Part III, Ch. 3.6(h). In any case that is not affirmed without an opinion, 8 C.F.R. § 1003.1(e)(4), or summarily dismissed, *id.* § 1003.1(e)(3), either a single BIA member or a three-member panel "shall issue a brief order affirming, modifying, or remanding the decision under review," *id.* § 1003.1(e)(5). Current regulations explicitly disfavor *en banc* proceedings which, "shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions." *Id.* § 1003.1(a)(5).

II. The 2020 Rule

The DOJ previously attempted to implement revisions to EOIR regulations that would have made sweeping changes to the procedures that govern EOIR with minimal notice. In August 2020, EOIR issued a notice of proposed rulemaking, issued a final rule in December 2020. *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 52,491 (Aug. 26, 2020) (NPRM); 85 Fed. Reg. 81,588, 81,638 (Dec. 16, 2020) (Final Rule) (2020 Rule)). Similar to the IFR at issue here, the 2020 Rule drastically altered BIA practice in a manner that systemically disadvantaged noncitizens. It shortened the BIA's briefing schedule, mandated concurrent briefing, limited reply briefs, and permitted briefing extensions only in

exceptional circumstances. 85 Fed. Reg. 81,588, 81,638 (Dec. 16, 2020). It also required that the BIA screen all cases for summary dismissals—which has, until this IFR, been permitted only in narrow circumstances, *see* 8 C.F.R. § 1003.1(d)(2)—within 14 days of the filing and adjudicate the case within 30 days. 85 Fed. Reg. at 81,652–53. It also required that all appeals be adjudicated within 90 days if they are before a single Board member, and 180 days if they are before a three-judge panel. *Id.* at 81,653. The 2020 Rule also empowered the Chairman of the BIA to take cases out of the hands of BIA members for referral to the director of EOIR or the Attorney General if the BIA did not abide by the required timeline. *Id.*

On March 10, 2021, the District Court for the Northern District of California preliminarily enjoined the 2020 Rule, finding that the plaintiffs were likely to succeed on their claims that (1) the 30-day public comment period was insufficient under the APA; and (2) the agencies violated the APA by failing to consider an important aspect of the problem, including "that the changes implemented by the Rule will foreclose noncitizens from seeking humanitarian relief to which they may be entitled and will result in the deportation of noncitizens who have meritorious claims for relief." *See Centro Legal De La Raza v. EOIR*, 524 F. Supp. 3d 919, 929 (N.D. Cal. 2021). On April 3, 2021, the District Court for the District of Columbia stayed the 2020 Rule, concluding that the 30-day public comment period was procedurally deficient. *CLINIC v. EOIR*, 21-cv-94, 2021 WL 3609986 (D.D.C. Apr. 3, 2021). In November 2021, DOJ announced its intention to rescind or modify the 2020 Rule, which it ultimately did in May 2024 following notice-and-comment rulemaking. *See* Efficient Case and Docket Management in Immigration Proceedings, 89 Fed. Reg. 46,742 (May 29, 2024) (codified at 8 C.F.R. at pts 1001, 1003, 1239, and 1240).

III. The Challenged 2026 Interim Final Rule

On February 6, 2026, Defendants published the IFR at issue here, which is set to take effect on March 9, 2026. *See* 91 Fed. Reg. 5,267. Though Defendants initially set a 30-day comment period, they extended the comment period by another 30 days, to April 8, 2026, but did not delay the IFR's implementation. EOIR, *Appellate Procedures for the Board of Immigration Appeals; Extension of Comment Period* (Feb. 26, 2026), https://perma.cc/36EX-DZCB. The IFR

fundamentally alters and, in many cases, functionally eliminates the BIA's appellate review of IJ decisions by significantly accelerating the timeline to appeal an adverse decision, requiring summary dismissal without merits review in the vast majority of cases, and other provisions as set forth below.

Abbreviated deadline to file Notice of Appeal and waiver of omitted issues. Except in certain asylum cases, the IFR shortens the timeline for filing an appeal to the BIA from 30 to 10 days. 91 Fed. Reg. at 5,270. The 10-day deadline will apply to all non-asylum cases and most asylum denials, except for asylum denials where the judge "has adjudicated an asylum application and did not deny the application under [8 U.S.C. § 1158(a)(2)]." *Id.* at 5,278. But even when an asylum denial would otherwise be subject to the 30-day deadline, the 10-day deadline applies if the decision is accompanied by a denial of withholding of removal or protection under the Convention Against Torture (as is almost always the case, *see* Ex. E, St. John Decl. ¶ 34). Moreover, the IFR mandates that any argument not raised in the Notice of Appeal be deemed "waived." 91 Fed. Reg. 5,278. Under the IFR, applicants will thus have just 10 days to secure the $1,030 filing fee, find counsel, prepare and file the necessary documents raising all appropriate arguments (before the record and transcripts have even been prepared, *see infra* at 8), and ensure that they are *received* by the BIA by the deadline, or face waiver.

Presumptive dismissal of appeals without record production. Under the IFR, if the BIA takes no action within 10 days after receiving a Notice of Appeal, the appeal "shall be deemed to have been summarily dismissed." 91 Fed. Reg. 5,277 (quoting new 8 C.F.R. § 1003.1(d)(2)(ii)). For each incoming appeal, a single BIA member decides whether to refer it to the entire BIA for an *en banc* vote. *Id.* The IFR requires that all appeals be summarily dismissed, with no opportunity for merits briefing, unless a majority of permanent BIA members vote to accept the case for review within 10 days of the filing of the appeal. *Id.* All such summary dismissals "shall constitute the final decision of the Board." *Id.* (quoting new 8 C.F.R. § 1003.1(d)(2)(iii)). Such dismissals "shall be effectuated through the issuance of a written order no later than 15 days after the appeal is filed." *Id.* (quoting new 8 C.F.R. § 1003.1(d)(2)(ii)).

Notably, the record of immigration court proceedings—including the transcripts of the IJ's oral decisions—will be created if and only if a majority of the *en banc* BIA first agrees to consider the case on the merits, and finds a "transcript is warranted." 91 Fed. Reg. 5,277–78. As explained above, the vast majority of IJ decisions are oral and transcripts are generally not available—to the parties or the BIA—until well after the IJ's decision. Under the IFR, the BIA will vote on whether to accept the case for review, or simply not act, thereby triggering summary dismissal, before the record has even been transmitted from the immigration court. *Id.* at 5,278 (addressing new 8 C.F.R. § 1003.1(e)(3)).

Abbreviated briefing schedule on merits. In the rare case where an appeal is accepted for review under the IFR's new requirements, the IFR imposes a simultaneous briefing schedule of 20 days for both parties. *Id.* at 5,272. Under the IFR, extensions may be granted only under "exceptional circumstances" as defined by 8 U.S.C. § 1229a(e)(1), such as "battery or extreme cruelty to the [noncitizen] or any child or parent of the [noncitizen], serious illness of the [noncitizen], or serious illness or death of the spouse, child, or parent of the [noncitizen], but not including less compelling circumstances) beyond the control of the [noncitizen]." Counsel's work conflicts, leave, or "similar concerns within the control of either party," do not constitute exceptional circumstances. *Id.* at 5,278. Finally, the BIA shall not accept" reply briefs unless "invited or ordered." *Id.*

Mandatory case completion timelines without discretion to extend. The IFR also imposes mandatory case completion deadlines. Cases assigned to a single BIA member must be decided within 90 days of completion of the record, and cases assigned to a three-member panel must be decided within 180 days. *Id.* at 5,277. If these deadlines are not met, the Chairman of the BIA "*shall* either self-assign the case or assign the case to a Vice Chairman for final decision within 14 days or *shall* refer the case to the Attorney General for decision." *Id.* (quoting 8 C.F.R. § 1003.1(e)(8)(ii) (emphasis added)).

The IFR also eliminates two provisions of the BIA regulations that had authorized the Chief Appellate Immigration Judge either to "extend adjudication deadlines in particular cases or to hold

cases based on a pending, potentially impactful action, either a new binding case decision or a new regulatory action." *Id.* at 5,274.

LEGAL STANDARD

Section 705 of the APA authorizes a court reviewing an agency action to "issue all necessary and appropriate process to postpone the effective date of [the] agency action or to preserve status or rights pending conclusion of the review proceedings" "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705. In deciding whether to issue a section 705 stay, the Court considers the familiar four-factor test governing preliminary injunctions. *See, e.g.*, *Dist. of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 15 (D.D.C. 2020). Accordingly, Plaintiffs must establish "that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest." *Id*. (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits

The IFR's effective date must be stayed under the APA for several reasons: because it was promulgated without notice and comment procedures; because it is contrary to law under the APA; and because it is arbitrary and capricious under the APA. *See* Compl. ¶¶ 122–52. Plaintiffs are likely to succeed on the merits of each of these claims.

A. Defendants failed to comply with notice-and-comment procedures

"The APA generally requires substantive rules to be promulgated through notice-and-comment rulemaking." *Cap. Area Immigrants' Rts. Coal.* ("*CAIR Coal.*") *v. Trump*, 471 F. Supp. 3d 25, 44 (D.D.C. 2020). In most cases, a "notice of proposed rule making shall be published in the Federal Register," and the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c). Only "[*a*]*fter* consideration of the relevant matter presented" may the agency finalize a rule. *Id*. (emphasis added).

Defendants took none of the required steps before issuing the IFR. *See* 91 Fed. Reg. at 5,274–75. Instead, they contend that both the foreign-affairs and procedural-rule exceptions excuse notice-and-comment rulemaking. *Id.* (invoking 5 U.S.C. §§ 553(a)(1), (b)(4)(A)). But exceptions to the APA's notice-and-comment requirements are "narrowly construed and only reluctantly countenanced," *N.J. Dep't of Env't. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980), and "'the onus is on the [agency]'" to overcome the "uphill battle" of establishing "'that notice and comment' should not be given," *Nat'l Venture Capital Ass'n, v. Duke*, 291 F. Supp. 3d 5, 16 (D.D.C. 2017) (alteration in original) (quoting *Action on Smoking & Health v. Civ. Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)). The IFR decisively fails as to both exceptions.

1. The foreign-affairs exception does not apply

Under the foreign-affairs exception, an agency may forgo notice-and-comment procedures where the Rule implicates a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). To invoke it, the IFR must "clearly and directly involve[s] activities or actions characteristic to the conduct of international relations." *E.B. v. U.S. Dep't of State*, 583 F. Supp. 3d 58, 64 (D.D.C. 2022); *accord Humana of S.C., Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978) ("'to the extent that' any one of the enumerated categories is 'clearly and directly' involved in the regulatory effort at issue, the Act's procedural compulsions are suspended.") (citation omitted).

Defendants fail to satisfy this exacting standard for the simple reason that changes to rules governing removal proceedings within the United States do not clearly and directly involve activities or actions characteristic to the conduct of international affairs. "[U]nder the law of this Circuit, the foreign affairs function exception covers heartland cases in which the rule itself directly involves the conduct of foreign affairs." *E.B*, 583 F. Supp. 3d at 65. Examples include implementation of an international agreement between the United States and another sovereign state, *Int'l Bhd. Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994), and rules regulating foreign diplomats in the United States. *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 175 (2d Cir. 2010).

But rules impacting removal proceedings, which occur domestically and which involve individuals inside the country, do not involve the conduct of international affairs. *See, e.g.*, *Narenji v. Civiletti*, 481 F. Supp. 1132, 1137 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979) ("the executive [may not] invoke the foreign affairs exemption to control a matter that essentially involves naturalization and deportation"); *Hou Ching Chow v. Att'y Gen.*, 362 F. Supp. 1288, 1290–91 (D.D.C. 1973) ("deportation proceedings do not come within the foreign affairs exemption."). At best, they have only a "downstream" or "*indirect* effect[]" on international relations, which is not enough to satisfy the foreign affairs exception. *E.B.*, 583 F. Supp. 3d at 67 (emphasis added) (holding that rule regulating documents that migrants entering the United States under the diversity visa lottery program must possess did not implicate foreign affairs functions); *CAIR Coal.*, 471 F. Supp. 3d at 55 (IFR regulating asylum access for noncitizens arriving on the southern border did not satisfy foreign affairs exception even though government claimed it was necessary for "ongoing negotiations with other countries").

Defendants' contrary arguments lack merit. Defendants primarily contend the government is "actively engaged in negotiations including wide-ranging discussions with foreign partners on matters related to border security." 91 Fed. Reg. at 5,275. Those negotiations apparently include efforts "to reduce illegal immigration and advance security in the United States and the region," and, according to Defendants, delaying implementation of the IFR to allow for notice and comment "*could* create migratory challenges for foreign partners," which would "undermine the momentum that this Administration has built with foreign partners towards addressing their shared migratory and border security challenges." *Id.* (emphasis added). But that can be said about any initiative involving immigration. *See, e.g.*, *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) ("The foreign affairs exception would become distended if applied to [immigration] actions generally, even though immigration matters typically implicate foreign affairs.").

For that reason, courts have long recognized that while "'immigration matters typically implicate foreign affairs' at least to some extent," Congress plainly did not intend to "eliminate[] public participation in this entire area of administrative law." *Permanent Mission*, 618 F.3d at 202

(quoting *Yassini*, 618 F.3d at 1360 n.4); *see CAIR Coal.*, 471 F. Supp. 3d at 54–55 (similar) Much more is needed to establish the "clear[] and direct[]" connection this circuit's precedents require, *Humana*, 590 F.2d at 1082, and to prevent the foreign-affairs exception from becoming an "escape clause" from the APA's central procedural protection, *Tenn. Gas Pipeline v. FERC*, 969 F.2d 1141, 1144 (citation omitted). Mere "downstream effects on foreign affairs or negotiations with other countries—either positive or negative—do not bring the Rule under this exception." *CAIR Coal.*, 471 F. Supp. 3d at 56–57. Much more than vague speculation that notice and comment "could" disrupt negotiations is necessary to establish "clearly and directly" how delayed implementation of the IFR would harm foreign negotiations. *E.B.*, 583 F. Supp. 3d at 66; *CAIR Coal.*, 471 F. Supp. 3d at 55–57.[1]

2. Notice-and-comment rulemaking would not have provoked definitely undesirable international consequences

To the extent Defendants rely on a less exacting "definitely undesirable international consequences" test for the foreign-affairs exception that some out-of-circuit courts have applied, *see* 91 Fed. Reg. at 5,274, the Court should reject that test. That test (1) "is unmoored from the legislative text of the foreign affairs exception"; (2) would render "superfluous" the APA's good cause exception; and (3) would conflict with D.C. Circuit case law interpreting the phrase "to the extent there is involved," as it is used in 5 U.S.C. § 553(a), to mean "clearly and directly involved in the regulatory effort at issue," *CAIR Coal.*, 471 F. Supp. 3d at 52–53, 55 (emphasis omitted) (quoting *Humana of S.C., Inc.*, 590 F.2d at 1082).

In any event, the IFR does not meet that standard. Even under that more permissive construction, an agency must point to evidence in "the record" showing "how immediate publication of the IFR, instead of announcement of a proposed rule followed by a 30-day period of notice and comment, is necessary for negotiations" or another foreign affairs function. *E. Bay*

[1] Defendants also argue that the rule "champion[s] a core American interest in accordance with American foreign policy." 91 Fed. Reg. at 5,275. But the "core" interest referenced in this IFR is "to always put America and American citizens first." *Id.* at 5,275. Again, citation to such an abstract, general idea is not sufficient to support use of the foreign affairs exception, given the need to show that a rule would "clearly and directly" interfere with foreign affairs.

Sanctuary Covenant v. Trump, 909 F.3d 1219, 1252–53 (9th Cir. 2018). In other words, there must be "evidence of undesirable international consequences that would result *if rulemaking were employed*." *Jean*, 711 F.2d at 1478 (emphasis added).

Defendants make no such showing. Instead, they contend that "[d]elaying measures like those adopted by this IFR" would impede "ongoing foreign policy goals" by signaling to potential foreign partners that the United States is not "committed to taking quick and robust action" to remove noncitizens. 91 Fed. Reg. 5,275. And according to Defendants, as a result, "countries *may be* less inclined to engage with the United States" on removal and related efforts in the future. *Id.* (emphasis added). But, as above, *see* Part I.A.1, courts have time and again held that it is insufficient that a rule could possibly, hypothetically, "implicate foreign affairs." *Yassini*, 618 F.2d at 1360 n.4. The government bears the burden of explaining how undergoing notice and comment would harm diplomatic negotiations or otherwise "provoke definitely undesirable international consequences." *Id.*; *see Jean*, 711 F.2d at 1477. The IFR identifies nothing "suggest[ing] that the APA's rulemaking provisions might trigger or even shape immediate consequences in foreign affairs," let alone collapse the hypothetical negotiations the government contends *could* be happening if this rule were subjected to notice and comment rulemaking. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1279 (9th Cir. 2020).

3. The procedural rule exception does not apply

The IFR also briefly contends that the exception to notice-and-comment procedures for "rules of agency organization, procedure, or practice," 5 U.S.C. § 553(b)(A), applies. 91 Fed. Reg. at 5,274. Defendants are wrong. This exception covers "internal house-keeping measures" and "must be narrowly construed." *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Nat'l Lab. Rels. Bd.* ("*AFL-CIO*"), 57 F.4th 1023, 1035 (D.C. Cir. 2023). "[T]he distinction between substantive and procedural rules is one of degree depending upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *Elec. Priv. Info. Ctr. v. DHS*, 653 F.3d 1, 5–6 (D.C. Cir. 2011) (quotations omitted)). "[T]he critical feature of a rule that satisfies the so-called procedural exception is that it covers agency actions

that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *AFL-CIO*, 57 F.4th at 1034. "Where a rule imposes substantive burden[s], encodes a substantive value judgment, trenches on substantial private rights or interests, or otherwise alters the rights or interests of parties," the exception does not apply. *Id*. (cleaned up). The IFR is decidedly not procedural.

First, the IFR plainly alters the rights or interests of parties appearing before the BIA. The IFR eliminates multiple protections for noncitizens appealing their immigration decisions, including by requiring summary dismissal of all appeals as the default rule, expanding BIA waiver rules, drastically shortening appeal deadlines, requiring simultaneous briefing, limiting extensions to "exceptional circumstances," eliminating review of transcripts by IJs before they are transmitted on appeal, preventing litigants from accessing a complete record prior to filing an appeal, and otherwise limiting BIA authority to extend deadlines or hold cases in abeyance for any reason. Beyond simply "alter[ing] the manner in which the parties present themselves" to the BIA, *AFL-CIO*, 57 F.4th at 1034, these changes completely upend settled expectations among litigants and dramatically curtail their ability to prepare and present their cases on appeal, with the consequence that the vast majority of appeals will be summarily dismissed without review of the merits. In short, the IFR deprives noncitizens of the notice and opportunity to be heard and obtain meaningful appellate review that they were previously entitled to under the INA and the regulations. It is therefore substantive in nature.

Second, even those provisions of the IFR that do not on their face alter substantive rights are nevertheless substantive in nature. They impose enormous burdens on noncitizens and the organizations like Plaintiffs that seek to serve them by significantly reducing the time for presenting claims to the BIA and creating other "procedural hurdles that foreclose fair consideration," thus enacting sweeping changes to noncitizens' appellate rights. *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983). If "a rule prescribes a timetable for asserting substantive rights," and "the time allotted is so short as to foreclose effective opportunity to make

one's case on the merits," a proposed rule must be subject to notice and comment. *Id.* That is unquestionably the case here.

Third, the IFR "encodes a substantive value judgment." *AFL-CIO*, 57 F.4th at 1034. The IFR rests on the view that dispensing with appeals as fast as possible, rather than fully considering and correcting errors of fact or law, is the primary purpose of the BIA. The IFR reflects that "the Department has reconsidered the Board's role as an appellate tribunal" and decided that efficiency and speed should take precedence over parties' right to a meaningful appeal. 91 Fed. Reg. at 5,270. In addition, the IFR asserts that "the foreign policy of the United States shall champion core American interests and always put America and American citizens first.'' *Id.* at 5,275 (citing 90 Fed. Reg. 8,337 (Jan. 20, 2025)). Both contentions assume that Defendants' goals necessarily require denying fundamental fairness to noncitizens and definitively take sides in the ongoing public debate on how to balance the need for security with noncitizens' interests in due process and fundamental fairness. This lively debate suggests that this IFR is substantive and not procedural.[2] *See Elec. Priv. Info. Ctr.*, 653 F.3d at 6 (public concern and media coverage suggests a rule is substantive). The normal notice-and-comment procedure would doubtless have produced significant comment and debate. This is made clear by EOIR's February 26, 2026 announcement that it will "extend[] the deadline for written comments to April 8, 2026." EOIR, *Appellate Procedures for the Board of Immigration Appeals; Extension of Comment Period* (Feb. 26, 2026), https://perma.cc/36EX-DZCB. However, notably absent is any decision by the BIA to postpone implementation of the rule pending consideration of those comments.

But rather than consider significant comment and debate before Defendants issued the rule, Defendants prejudged the issue, unilaterally finding that the IFR will increase efficiency without altering "the rights or interests of parties"—an assertion the IFR never explains. 91 Fed. Reg. at 5,274. A rule that picks sides in an ongoing debate over substantive policy is a legislative rule

[2] *See, e.g.*, Alan Feuer et al., *Federal Courts' Emerging Bottom Line: Due Process Rights for Immigrants*, N.Y. TIMES, May 17, 2025, at 1; *Giving Immigration Courts the Judges They Need is a Win-Win*, WASH. POST (Feb. 5, 2026), https://perma.cc/67NN-V8Q8.

requiring notice and comment, not a mere rule of procedure. *See AFL-CIO*, 57 F.4th at 1042 (provision narrowing who could be election observer "encodes a substantive value judgment about the type of observers that best serve . . . policy goals").

Defendants' contrary arguments lack merit. They contend the IFR "affects only the practices and procedures of the Board" and are "directed toward improving [its] efficient and effective operations," and that the IFR "merely make[s] 'judgment[s] about what mechanics and processes are most efficient'" and so "are procedural even if they have 'impacts on outcomes.'" 91 Fed. Reg. at 5,274 (quoting *JEM Broad. Co., Inc., v. FCC*, 22 F.3d 320, 328 (D.C. Cir. 1994)). That self-serving description ignores reality. Indeed, the very case Defendants cite defeats their claim: A "critical feature" of a procedural rule is that it regulates *internal agency actors and processes* but not members of the public. *See JEM*, 22 F.3d at 326; *Batterton v. Marshall*, 648 F.2d 694, 707 n.70 (D.C. Cir. 1980) ("Procedural rules are those that relate to the method of operation of the agency, while substantive rules are those which establish standards of conduct or entitlement."). The IFR significantly overhauls the rights of immigrants challenging their removal from this country, imposing significant "substantive burdens" on them. *AFL-CIO*, 57 F.4th at 1035.

Defendants concede that rules that "alter[] the rights or interests of parties [are] not procedural," but assert that nothing in the INA entitles noncitizens to any specific procedures on appeal, let alone to appeal at all. 91 Fed. Reg. at 5,274. But whether a noncitizen has any statutory entitlement to any specific process is beside the point. Rules "intended primarily to confer important procedural benefits upon individuals in the face of unfettered discretion" are not procedural. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970). The procedures the IFR alters all confer important benefits that limit the BIA's discretion and ensure meaningful consideration of appeals on the merits. Here, Defendants' sweeping changes to the BIA's role as an appellate body impacts far more than how litigants present their views to the agency—they impact substantive outcomes and therefore cannot be subject to the procedural rule exception. *See EPIC*, 653 F.3d at 2–3, 6 (rejecting argument that "decision merely affected the procedures TSA

would use in processing passengers through the checkpoint," because changed procedures "substantively affect[ed] the public"); *Pickus v. Bd. of Parole*, 507 F.2d 1107, 1113–14 (D.C. Cir. 1974) (rules governing parole hearings not procedural because they went "beyond formality and substantially affect[ed]" prisoners' liberty).

B. The IFR is contrary to the INA

The IFR violates the INA because its alterations to the current regulatory framework, both independently and in combination, contravene the INA's guarantees of the right to counsel and eviscerate appellate review in most cases. The IFR also unlawfully curtails the 30-day mandatory deadline for appeals of asylum claims in certain circumstances, 8 U.S.C. § 1158(d)(5)(A)(iv).

1. The IFR contravenes the INA's right to counsel

The INA guarantees noncitizens "the privilege of being represented (at no expense to the Government) by [] counsel . . . as he shall choose," 8 U.S.C. §§ 1229a(b)(4)(A), 1362. For noncitizens facing deportation, "[t]he right to counsel is a particularly important procedural safeguard because of the grave consequences of removal." *Leslie v. Att'y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (In light of the "high stakes of a removal proceeding and the maze of immigration rules and regulations," "[o]ne way we ensure that the 'standards of fairness' are met is by guaranteeing that [noncitizens] have the opportunity to be represented by counsel" (citation omitted)). The right to counsel also requires *meaningful* representation. *See, e.g.*, *McFarland v. Scott*, 512 U.S. 849, 858 (1994) ("[T]he right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's . . . claims."). Thus, EOIR "must provide [noncitizens] with reasonable time to locate counsel and permit counsel to prepare for the hearing." *Biwot*, 403 F.3d at 1099; *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (stating that noncitizens' due process right to counsel "must be respected in substance as well as in name") (citation omitted).

In order for the right to counsel to be meaningful, EOIR cannot impose "obstacles" such as "time restrictions" that have "the cumulative effect of … prevent[ing] [noncitizens] from contacting counsel and receiving any legal advice." *Orantes-Hernandez*, 919 F.2d at 565–66. But

the IFR directly interferes with noncitizens' right to representation by counsel by severely restricting the timeframe under which appellate counsel must be identified, agree to representation, learn the case, and prepare an appeal. Ex. A, Brown Decl. ¶¶ 16, 21–23 ("[I]t is even less likely that attorneys would be able to receive notice of an asylum denial, request a copy of the DAR, review it, and prepare a comprehensive Notice of Appeal by the [IFR's] new deadline."); Koop Decl. ¶ 34; Ex. D, Mayer-Salins Decl. ¶¶ 26–27. As a result of the IFR's 10-day appeal deadline, it will be practically impossible for noncitizens—especially detained noncitizens—who proceeded pro se before the IJ to retain counsel, and for detained noncitizens with retained counsel to make an informed decision with their attorney. Mayer-Salins Decl. ¶¶ 27, 30–32. Ex. B, Jones Decl. ¶ 33 (describing the additional burdens the 10-day appeal deadline places on detained noncitizens.) Combined with the IFR's mandate that all issues not identified in the Notice of Appeal be deemed "waived," the 20-day briefing schedule from an unpredictable date, and the strict limitation on extensions, even noncitizens that already retained counsel will face draconian restrictions that undermine their ability to timely and adequately prepare critical materials to represent their clients on appeal. Jones Decl. ¶¶ 39–40.

Impact on pro se individuals. The majority of noncitizens in removal proceedings—including most people who are detained—proceed pro se before the IJ. TRAC Immigration, *Pending Court Cases by Immigrant's Address* (Sept. 2025), https://perma.cc/R6ZM-5T87. As Defendants appear to acknowledge, noncitizens who were pro se before the IJ nevertheless retain their right to counsel for the purpose of their appeal. *See* 91 Fed. Reg. at 5,272, n.16. But the IFR all but eliminates that right. Under the IFR, if a pro se noncitizen seeks counsel for their appeal, it is unlikely that Plaintiffs or similarly situated counsel would be able to review the case and determine whether to accept it on the extremely short timeframe provided. Koop Decl. ¶ 40; Brown Decl. ¶ 16 (stating that, in order to "adequately and comprehensively appeal a denied asylum application" under the IFR's shortened deadlines, "an attorney would need to be in the courtroom to see for themselves what happened"); Jones Decl. ¶ 41; Mayer-Salins Decl. ¶¶ 26–27.

As a starting point, the demand for immigration counsel has risen sharply under this

administration, resulting in wait times of a week or more for intake appointments in many of Plaintiffs' programs. *See, e.g.*, Koop Decl. ¶ 40; Brown Decl. ¶ 25 ("We open our public intake line for prospective clients only one day a month because we receive far more calls from people seeking assistance than we have capacity to represent."); Mayer-Salins Decl. ¶ 26. After an intake, counsel would have to evaluate and determine the likelihood of success for a potential case within that same 10-day period, while also navigating additional structural barriers that consume several of those 10 days. St. John Decl. ¶¶ 36, 52–56; Koop Decl. ¶¶ 38–39 (describing how this 10-day deadline is especially unworkable for clients that are detained where it takes days to schedule a confidential legal call, and for mentally ill clients that need more time to fill out the BIA fee waiver). For example, immigration counsel would have to request and obtain written permission from pro se individuals to obtain a copy of the Digital Audio Recording ("DAR") of the IJ's decision from EOIR—a process that typically takes 1 to 3 days—because no transcript would be available at that time. St. John Decl. ¶¶ 45–46; Mayer-Salins Decl. ¶ 27 (explaining that a "newly-retained attorney must first procure a signed E-59 form (Certification and Release of Records) and then negotiate with EOIR staff over releasing the DAR with an E-59 alone."); Jones Decl. ¶¶ 40-41 ("quickly obtaining the DAR is also not always possible... to obtain and listen to the entire DAR in order to preserve all possible appellate issues on the NOA within 10 days of the IJ decision is not realistic or responsible."). Plaintiffs may ultimately be unable to obtain the DAR within that timeframe and, as a result, would be unable to review or accept the case. Koop Decl. ¶ 49; Brown Decl. ¶¶ 16, 23 (finding that immigration judges "rarely deliver copies of the [DAR] for attorneys to review in a timely fashion," and one HIAS client has waited roughly four months to receive it). Therefore, for individuals who were pro se before the IJ and trying to obtain counsel for a BIA appeal, the IFR will make it nearly impossible for Plaintiffs to represent them. Koop Decl. ¶ 49; Brown Decl. ¶ 16 (under the IFR, "HIAS's assistance to pro se individuals is effectively going to come to an end").

Impact on detained noncitizens. Detained noncitizens face the above-described structural barriers where they proceeded pro se before an IJ and seek to procure counsel for their appeal, but

the difficulties are multiplied by the myriad logistical barriers in ICE detention centers. . Koop Decl. ¶¶ 38, 40; St. John Decl. ¶¶ 52–55; Jones Decl. ¶33 (noting the many barriers to communicating with clients in ICE detention.). Even if a detained noncitizen has already retained counsel, the IFR's 10-day appeal deadline is insufficient for counsel to contact their clients in detention and make complex and consequential decisions about whether and how to appeal. Koop Decl. ¶ 37; Mayer-Salins Decl. ¶¶ 30–31. For example, counsel's ability to request and receive permission for confidential legal calls to conduct client counseling is extremely limited. St. John Decl. ¶ 52 ("Communication barriers in ICE custody—expensive phone systems that don't provide for private legal calls, remote locations where many private attorneys cannot or will not conduct in-person legal visits, and slow and at times costly mail systems—already combine to make access to counsel more difficult for people who are detained than those who are not."); Mayer-Salins Decl. ¶ 30 ("Securing a private call with a [detained] client frequently takes a week or more."); Jones Decl. ¶ 33. Additionally, detained individuals' calls with their attorneys are often scheduled days or weeks out (if at all), canceled without notice, dropped, or not provided in a confidential space. Koop Decl. ¶ 38; Jones Decl. ¶ 33. As a result of the IFR, detained noncitizens will face extreme difficulty meaningfully exercising their right to counsel. Koop Decl. ¶ 38; St. John Decl. ¶¶ 52, 55–56.

Impact on noncitizens with counsel. Beyond pro se and detained noncitizens, the IFR imposes "obstacles" such as "time restrictions" that prevent noncitizens with counsel from the ability to contact their counsel, receive legal advice, and make an informed decision before deadlines lapse and rights are waived. *Orantes-Hernandez*, 919 F.2d at 565–66; *see also, e.g.*, *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (failure to grant continuances violated right to counsel); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975) ("[T]he immigration judge had no justification for denying a reasonable further continuance to the Castanedas for the purpose of obtaining counsel.").

First, the IFR will require counsel to spend hours to review a case and assert all potential appellate issues in the Notice of Appeal without the benefit of a written transcript or a written

decision from the IJ, or else risk forfeiture of those claims. Koop Decl. ¶ 33-34; St. John Decl. ¶¶ 66–67 (lack of a written transcript "fundamentally interferes with individuals' ability to identify appellate issues and present legal arguments to the Board"); Jones Decl. ¶ 39. And any forfeiture of appealable issues will impair immigration counsel's ability to vindicate the noncitizens' rights in federal court. St. John Decl. ¶¶ 79–80.

Second, the 20-day briefing schedule and limitation on extensions impose serious obstacles for counsel to effectively represent their clients. Because counsel cannot predict when the briefing schedule will be set (*i.e.*, when the 20-day clock will start), the IFR's 20-day brief schedule would render counsel unable to schedule their workload and time off in accordance with their client's needs. Koop Decl. ¶¶ 50, 53–54; St. John Decl. ¶¶ 87–88 (the IFR will "eliminat[e] much of the critical flexibility that FIRRP attorneys rely upon to competently manage a robust detained caseload"); Jones Decl. ¶ 44 (noting the obstacles the IFR's 20-day brief schedule poses for their staff.) . This will pose a significant hardship on immigration counsel and their pro bono partners—if an attorney has accepted a client, but is out of the office for illness, medical leave, or vacation when the brief is due, the IFR takes away the BIA's discretion to permit even a short extension. Koop Decl. ¶ 54; Mayer-Salins Decl. ¶ 29; St. John Decl. ¶ 87; Jones Decl. ¶ 44. Furthermore, by arbitrarily capping extensions at 15 days, the IFR unreasonably restricts counsel's ability to advise and assist their client on appeal, even where they have already demonstrated that exceptional circumstances hinder their ability to timely file the brief. No matter the circumstances,—be they a natural disaster, a critical health emergency, or competing court deadlines—noncitizens and their counsel cannot obtain more than a 15-day extension.

2. The IFR contravenes the INA's deliberate decision that the BIA conducts meaningful appellate review

The INA also establishes a statutory framework to determine whether a noncitizen is subject to removal that positions the BIA as the appellate review body to determine the final agency decision for purposes of federal court review. *See* 8 U.S.C. § 1101(a)(47). As a part of that framework, the INA guarantees noncitizens "a reasonable opportunity to examine the evidence

against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government," 8 U.S.C. § 1229a(b)(4)(B), *see also Matter of R-C-R-*, 28 I. & N. Dec. 74, 77 (B.I.A. 2020) (a noncitizen "who faces removal is entitled to a full and fair removal hearing under" the INA). Yet the IFR undermines noncitizens' statutory right to a full and fair hearing by —effectively stripping any real meaning from BIA review.

The INA explicitly provides that IJs' orders of deportation become final only upon a "determination by the [BIA] affirming such order," or the expiration of the time to file a notice of appeal. 8 U.S.C. § 1101(a)(47)(B). But under the IFR, the BIA will frequently not make any "determination" at all. *See Determination*, Merriam Webster, https://perma.cc/GJ6L-63G2 (a "determination" is "the act of officially deciding something"). The IFR's summary-dismissal mandate requires the BIA to automatically dismiss appeals based solely on the expiration of a 10-day period—without any actual review or decision. And the 10-day *en banc* voting period ends before the BIA even receives the full record from the IJ, *see supra* at 9. Thus, the IFR allows the BIA to dismiss cases without ever assessing the merits, in plain violation of section 1101(a)(47).

Relatedly, the INA also requires a "complete record [to] be kept" of removal proceedings, 8 U.S.C. §1229a(b)(4)(C)), so that the parties, their counsel, the BIA and the federal courts have the benefit of the transcript and record in deciding whether to proceed on appeal. "Absence of such a record of proceedings below hampers the ability of an alien to mount a challenge to the proceedings that were conducted before the IJ. In addition, the lack of such a transcript may foreclose 'effective administrative and judicial review.'" *Kheireddine v. Gonzales*, 427 F.3d 80, 84 (1st Cir. 2005) (quoting *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996)).

The IFR renders the "complete record" requirement meaningless by requiring parties to make their whole case without the benefit of the record, because they must raise all claims they would raise on appeal by the 10-day appeal deadline or be deemed to have waived any claims not raised. 91 Fed. Reg. 5,278. That in turn interferes with an individual's ability to mount a challenge to the proceedings that were conducted before the IJ on a petition for review in the federal courts, because claims the BIA deemed "waived" cannot be raised in the court of appeals. *See, e.g.*,

Alanniz v. Barr, 924 F.3d 1061, 1068–69 (9th Cir. 2019). Accordingly, the IFR's requirement that appeals be filed within 10 days, before an individual can access the full record of proceeding below, violates section 1229a(b)(4)(C) and undermines the judicial review Congress provided for.

Other provisions of the INA similarly reflect a congressional judgment that BIA appellate review must be meaningful—a judgment flouted by the IFR. Under 8 U.S.C. § 1229a(c), for example, the IJ must inform a noncitizen of their "right to appeal that decision" and "if no adverse credibility determination is explicitly made [by the IJ], the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1229a(c)(4)(C)-(5). Where the BIA does not make any determination on the merits, and an applicant's appeal is automatically dismissed without individualized review, the applicant does not receive their entitlement to "a rebuttable presumption of credibility." *Id.*

3. The IFR violates 8 U.S.C. § 1158(d)(5)(A)(iv)

Finally, the IFR's 10-day appeal deadline is inconsistent with 8 U.S.C. § 1158(d)(5)(A)(iv), which provides the right to an "administrative appeal" of any decision on an asylum application, and a statutory deadline of 30 days from the date of the decision to file the appeal. 8 U.S.C. § 1158(d)(5)(A)(iv) ("[A]ny administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later."). The IFR violates this provision by shortening the 30-day mandatory deadline to 10 days for anyone whose asylum application "was denied on grounds . . . specified in [8 U.S.C. § 1158(a)(2)(A)-(C)]." 91 Fed. Reg. at 5,272. But § 1158(d)(5)(A)(iv) does not distinguish between asylum applications denied under § 1158(a)(2)(A)-(C) and other grounds in § 1158(a) and (b), and nothing in the IFR explains why the right to a 30-day appeal deadline is not required by statute in all asylum cases. On top of that, the IFR effectively nullifies the 30-day timeline in § 1158(d)(5)(A) for all asylum applications, r regardless of the basis for the IJ's decision de. That is because the asylum application (form I-589) also serves as an application for related forms of relief: withholding of removal and protection under the Convention Against Torture (CAT). When IJs adjudicate asylum

claims, they also must simultaneously adjudicate a noncitizen's applications for withholding and CAT protection. Because the IFR does not exempt those decisions, all appeals from asylum decisions would, in effect, need to abide by the 10-day deadline. St. John Decl. ¶ 34. By cutting the appeal period to 10 days, the IFR directly contradicts the INA's requirements.

C. The IFR is arbitrary and capricious

In issuing a rule, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quotation omitted). An agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. "To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses." *Allied Loc. & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000).

Moreover, an agency must provide a "reasoned explanation" for departing from prior policy and must provide "a more detailed justification than what would suffice for a new policy" when "its prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009); *accord Dep't of Homeland Sec. v. Regents*, 591 U.S. 1, 30 (2020) (agency action is arbitrary and capricious if, "[w]hen an agency changes course," it fails to take into account "that longstanding policies may have engendered serious reliance interests" (quotation marks omitted)). Although an agency is not required to "consider all policy alternatives in reaching [its] decision," where the agency is "not writing on a blank slate, . . . it [is] required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 33 (internal citations omitted).

The IFR is arbitrary and capricious for multiple reasons. First, Defendants failed to consider multiple important aspects of the issue, including the impact of the evisceration of appellate review on noncitizens in removal proceedings and their counsel's ability to represent them, especially those who are detained and pro se, in contravention of due process and statutory requirements. Second, Defendants did not consider reliance interests when upending the current system for appellate review, effective immediately and without the opportunity for public input. Third, Defendants did not consider reasonable alternatives to address any of the purported efficiency gains they believe the IFR promotes and ignored data that ran counter to their explanations.

1. Defendants failed to consider the impact of the IFR on noncitizens and their counsel

By requiring summary dismissal in most cases, the IFR fundamentally upends appellate practice for noncitizens and their counsel in ways that Defendants were required to, but did not, contend with. This profound change is amplified by the shortening of the appeals period from 30 to 10 days in most cases. As discussed above, *supra* Part I.B.1, a noncitizen challenging a removal order and their counsel must now identify and include all possible issues in their Notice of Appeal or else waive them, and brief their arguments in the Notice to survive summary dismissal. And they must do so without access to: (1) a written decision from the IJ in the vast majority of cases; (2) a transcript of the underlying proceedings before the IJ; and (3) in some cases, any record of the underlying proceeding at all. *See supra* Part I.B.1; *see also* Mayer-Salins Decl. ¶ 27 (noting that only attorneys who appeared as counsel in Immigration Court can access the digital audio recording on ECAS); Brown Decl. ¶ 23 (describing difficulty in obtaining any Immigration Court records where client was pro se below). This will be an extremely difficult task for any noncitizen and their counsel under the IFR's compressed timeline. And for detained pro se noncitizens, this will be altogether impossible. Mayer-Salins Decl. ¶ 23. These constraints directly undermine noncitizens' statutory and due process rights. Defendants failed to meaningfully consider these critical protections as required by the APA.

First, Defendants failed to consider the IFR's impact on the constitutional and statutory right to counsel for noncitizens who are pro se before the IJ or seek to change counsel on appeal. "'Entirely failing to consider an important aspect of the problem,' such as the applicability of another federal statute, 'alone renders their decisions arbitrary and capricious.'" *Drs. for Am. v. Off. of Pers. Mgmt.*, 793 F. Supp. 3d 112, 146 (D.D.C. 2025) (quoting *Regents*, 591 U.S. at 30). The IFR creates significant barriers that undermine noncitizens' rights under the Due Process Clause and the INA, as well as counsel's ability to protect those rights. *See supra* at Part I.B.1. As previously explained, the IFR's 10-day appeal deadline makes it nearly impossible for pro se noncitizens (especially if detained) to retain counsel and for detained noncitizens with counsel to meaningfully exercise their right to counsel. *Id.* Coupled with the IFR's waiver provision, the 20-day briefing deadline, and strict limits on extensions, and other provisions, even represented noncitizens face severe constraints that hinder counsel's ability to timely and effectively counsel their clients and prepare their appeals. Defendants fail to consider these serious, predictable consequences of the IFR.

Instead, Defendants gloss over the IFR's impact on pro se noncitizens facing removal, asserting in a footnote—without any support or reasoning—that the shift to a 10-day appeals period "may" impact noncitizens' ability to retain counsel to file a Notice of Appeal, but the "benefits of the [IFR] outweigh that potential impact." 91 Fed. Reg. at 5,272 n.16. The IFR also explains, without support, that the "Department believes this population will be relatively small," *id.*—a conclusion that contradicts Plaintiffs' firsthand experience, where advising pro se noncitizens and taking new cases for appeal after the noncitizen has lost in front of the IJ is a core component of Plaintiffs' work. *See* St. John Decl. ¶¶ 18, 21–22; Koop Decl. ¶¶ 15–16; Brown Decl. ¶ 10.

Second, Defendants entirely failed to consider that the 10-day appeal deadline would render detained noncitizens proceeding pro se unable to appeal an adverse IJ decision, in plain contravention of their due process rights. *See Make the Rd. New York v. Noem*, No. 25-5320, 2025 WL 3563313, at *22 (D.C. Cir. Nov. 22, 2025) (The Fifth Amendment's due process protections

must "ensure fair consideration of a person's claims that they should not be removed before it occurs."). Indeed, Defendants' mention of detained noncitizens is primarily limited to an explanation that they will be required to submit simultaneous (rather than consecutive) briefs on the merits. 91 Fed. Reg. at 5,272. This is a glaring omission, as it disregards the foreseeable impact of the IFR—effectively preventing noncitizens from appealing an adverse IJ decision—which is central to a reasoned analysis. *See Ohio v. EPA*, 603 U.S. 279, 293 (2024) ("An agency cannot simply ignore an important aspect of the problem." (cleaned up)).

Detained individuals lack reliable—if any—access to the internet or ECAS, EOIR's electronic filing system. St. John Decl. ¶¶ 38–39; Mayer-Salins Decl. ¶¶ 1, 22 They must instead rely on delayed mail systems within detention facilities, where delivery of a single piece of mail can take more than 10 days. *See* Mayer-Salins Decl. ¶ 23 ("For a detained individual with counsel, Amica Center frequently sees mail take 10–14 days to be received by the client."); St. John Decl. ¶¶ 47–48 (describing significant delays to both receiving incoming and processing outgoing mail in Arizona detention facilities, and the BIA mail room's own 3-7 day delay in processing incoming mail). A pro se detained individual, therefore, could not receive timely notice of a written IJ decision, could not prepare and mail a Notice of Appeal to the BIA within a 10-day deadline, and could not reliably meet the 20-day briefing deadline. Mayer-Salins Decl. ¶¶ 22–23; St. John Decl. ¶¶ 47–50; . Detained noncitizens with limited English proficiency, low literacy, or disabilities requiring accommodations to complete the Notice of Appeal or merits brief will face these challenges even more acutely. *See* Mayer-Salins Decl. ¶ 23; St. John Decl. ¶ 89 ("The vast majority of pro se noncitizens FIRRP serves are non-English speaking and, in addition to the substantial language barriers, they overwhelmingly have limited access to law libraries, computers, and other resources that could potentially help them prepare briefs."). Consequently, under the IFR, detained pro se individuals will be unable to exhaust their remedies or preserve issues for federal court review. And Defendants' failure to consider the IFR's impact on detained individuals is particularly egregious given the explosion in ICE detention of noncitizens from the interior of the nation, resulting in an all-time high population in ICE detention of over 68,000 people as of

February 7, 2026. *See* TRAC Immigration, *ICE Detainees* (Feb. 7, 2026), https://perma.cc/CMP9-KQPZ.

Third, the IFR does not articulate the specific criteria or standards the BIA will apply when assessing whether a case should be reviewed on the merits, underscoring its arbitrary nature. . This lack of guidance will predictably cause confusion for noncitizens and their counsel alike, both of whom can only guess at what issues might be sufficient for a rare merits review of the decision below. *See, e.g.*, Koop Decl. ¶ 30; Jones Decl. ¶ 22; St. John Decl. ¶ 68; Brown Decl. ¶ 40. This fundamental failure to acknowledge, let alone address this problem, renders the rule arbitrary and capricious.

Fourth, the IFR also did not take into account the confusion that will predictably result from the IFR's dual-tiered system of deadlines in asylum cases. For cases in which the IJ denied asylum on multiple grounds, two different deadlines would apply. In addition, because applications for asylum typically include alternative requests for relief like withholding of removal and protection under CAT, Plaintiffs and pro se noncitizens must now treat appeals from denials of all three forms of relief as subject to the 10-day deadline, even if the statute demands a 30-day window. *See* St. John Decl. ¶ 34; Mayer-Salins Decl. ¶ 24; Brown Decl. ¶ 26. Defendants do not acknowledge, much less explain, this decision or the consequences that flow from it. As a result, noncitizens and their counsel will be forced to file a Notice of Appeal that fully identifies and briefs all possible grounds for appeal within ten days, to avoid forfeiting any bases covered by the shorter appeals deadline. St. John. Decl. ¶¶ 32–34; Brown Decl. ¶ 26 ("HIAS attorneys would need to presume that all potential appeal clients face a ten-day filing deadline, which would artificially co-opt our calendars and capacity . . . ."); *see* 91 Fed. Reg. at 5,278. These gaps are a direct result of Defendants' rushed implementation of the IFR without opportunity for public comment before it takes effect, strongly suggesting that the new system is designed for noncitizens' appeals to fail—the opposite of reasoned decision-making.

2. Defendants failed to account for recent, sweeping changes to immigration court practice and how the IFR would exacerbate existing barriers

The IFR is also arbitrary and capricious because it fails to account for other recent, sweeping changes to immigration court practice over the past year and disregards how the IFR would exacerbate existing barriers that impede noncitizens' ability to vindicate their legal rights and pursue relief for which they are eligible. "[A]n agency must . . . acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011). And "[b]y failing to consider the combined impact" of the IFR and the changes to the system in the last year, Defendants "failed to consider an important aspect of the problem and disregarded 'inconvenient facts' about the combined impact of these rules." *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 541 (N.D. Cal. 2020).

First, Defendants do not consider how the summary-dismissal provision and 10-day appeal deadline intersect with the recent dramatic increase in BIA appeal fees from $110 to $1,030. *See supra* at 8. The INA requires individuals to exhaust any administrative process available "as of right" before they may petition a federal appeals court for review of an order of removal. 8 U.S.C. § 1252(d)(1). Because the IFR all but guarantees summary dismissal, the fee to appeal to the BIA functions as little more than a toll to access an Article III court. A noncitizen seeking to appeal must now, within just ten days of receiving an adverse IJ decision, pay $1,030 merely to preserve the right to federal court review—despite the virtual certainty that the BIA will not consider the appeal on the merits.[3] Defendants ignore this reality. Instead, Defendants' only acknowledgment of the $1,030 appeal fee is to speculate about its impact on the volume of appeals. *See* 91 Fed.

[3] While a fee waiver is theoretically available, even under the current 30-day appeals period, the BIA often fails to adjudicate fee waivers and routinely denies them, and failure to pay the fee or receive an approved waiver within the appeal period is grounds for dismissal of the appeal. Koop Decl. ¶¶ 27, 85. Moreover, fee waivers are categorically unavailable for certain types of appeals, and recent BIA precedent–which the IFR does not mention, let alone consider—establishes their presumptive unavailability in many cases. *See Matter of Garcia Martinez*, 29 I. & N. Dec. 169 (BIA Aug. 2025) (any person represented by "private counsel presumed to have the ability to pay any requisite filing fee" and fee waiver applications for non-detained individuals will be "presumptively invalid" if they are completed with zeros).

Reg. at 5,270 n.10. By coupling a substantial fee increase with the effective elimination of meaningful review, the IFR imposes significant new burdens that required a reasoned explanation for its asserted efficiency gains. The agency's failure to confront that tradeoff renders the IFR arbitrary and capricious.

Second, over the past year, the Trump-Vance administration has implemented unprecedented changes to immigration court practice that dramatically curtail the procedural protections available to noncitizens before IJs. A series of recent BIA decisions has substantially restricted individualized review of applications for humanitarian relief. These include: *Matter of H-A-A-V-*, 29 I. & N. Dec. 233, 238 (BIA Sept. 2025), in which the BIA held that where the an application seems insufficient, an IJ "may pretermit the applications without a full evidentiary hearing on the merits of the claim;" *Matter of C-A-R-R-*, 29 I. & N. Dec. 13 (BIA Mar. 2025), in which the BIA held that an application for asylum and withholding of removal "may be considered waived or abandoned" if the noncitizen fails to perfectly complete the English-only form; and *Matter of C-I-G-M & L-V-S-G-*, 29 I. & N. Dec. 291 (BIA Oct. 2025), in which the Board severely limited IJs' authority to consider a noncitizen's asylum application in cases where the government *relies* on an "Asylum Cooperative Agreement" to request that an individual be ordered removed to a third country. Under these agency decisions, DHS has successfully pretermitted the asylum applications of thousands of noncitizens in proceedings, leaving them without the opportunity to explain why they qualify for asylum or related protection to an immigration judge *at all*. *See* Joseph Gunter & Brandon Marrow, *No Hearing Necessary*, bklg blog (Feb. 18, 2026), https://perma.cc/7FVC-RQKG. Similarly, Defendants have dismissed the removal proceedings of thousands of noncitizens over their objection in the last year, frequently in order to place them in expedited removal proceedings. *See* Laila Khan & Chris Opila, *ICE Attorneys Increasingly Request Case Dismissals at Immigration Court Hearings—and Immigration Judges Grant Them on the Spot*, Am. Immigr. Council (Oct. 7, 2025), https://perma.cc/RV2N-JBHB. Noncitizens whose proceedings are dismissed do not get a hearing on their applications for relief, but they also do not have final orders of removal and thus cannot seek judicial review, *see* 8 U.S.C. § 1252. And

as described above, Defendants have reshaped the Immigration Judge bench by firing scores of IJs with immigration law experience and hiring people with no expertise and little training. *See supra* at 3. These contemporaneous agency actions strip noncitizens of access to individualized consideration of defenses to removal and increase the likelihood of erroneous outcomes and unfair proceedings before the IJ. *See, e.g.*, Brown Decl. ¶¶ 30, 37 (under the IFR and EOIR's pretermission policy, a noncitizen could complete removal proceedings "without their claim for protection ever getting a full and fair consideration"); St. John Decl. ¶ 104 (noting "pervasive denials" even of meritorious cases); Koop Decl. ¶ 82 (describing project intended to facilitate appellate representation of asylum seekers whose applications were pretermitted without any merits decision); Mayer-Salins Decl. ¶ 25 (describing the undermining of due process in EOIR proceedings and how it would lead many to choose stipulated deportation over detention with no due process). Those changes make the availability of meaningful review all the more critical, but the IFR now seeks to effectively eliminate review of those decisions by the BIA. Given the substantial liberty interests at stake when the government seeks to remove a noncitizen from the United States, *see supra* at 8–9, the APA requires Defendants to acknowledge both the changes at the immigration court level and the cumulative effect of further constricting appellate review. *See Portland Cement Ass'n*, 665 F.3d at 187.

3. Defendants' transformation of the BIA failed to consider reliance interests

The sudden, drastic change in the system governing review of removal orders required Defendants to consider the reliance interests of noncitizens and their counsel, such as Plaintiffs. *See Encino Motorcars, LLC. v. Navarro,* 579 U.S. 211, 212 (2016) (where the government reverses a "longstanding polic[y]," it must take into account "engendered serious reliance interests"). These interests are weighty where, as here, the agency is not writing on a "blank slate" but instead upending the system to require profound shifts in removal defense, provision of legal services, and case management. Defendants gesture at reliance interests, but in the same breath, they minimize any concerns because the IFR applies only prospectively and not to pending appeals. 91 Fed. Reg.

at 5,271. But Defendants nevertheless failed to account for the significant reliance interests of noncitizens currently in removal proceedings and their counsel in the appellate process, particularly where the rates at which both Immigration Courts and specific IJs grant relief vary widely across the country and the BIA's current role is to create more uniformity, *see* 8 C.F.R. 1003.1(d)(1). *See* TRAC Immigration, *Immigration Court Asylum Grant Rates Cut in Half* (Nov. 18, 2025), https://perma.cc/V62X-9J8K.

Plaintiffs, along with many other legal service providers whose existence is specifically contemplated by the INA, *see* § 1229(b)(2), have structured their business models around the existence of an appellate process at the BIA. For example, many of Plaintiffs' core work involves a focus on representing noncitizens at the IJ and BIA level representation, and most of their staff lack the necessary experience or knowledge to litigate petitions for review in the federal courts of appeals. *See, e.g.*, Brown Decl. ¶¶ 13–14; Jones Decl. ¶¶ 28–29; Mayer-Salins Decl. ¶¶ 7, 10, 16. Yet Defendants readily admit that through the IFR, they have "reconsidered the Board's role as an appellate tribunal." 91 Fed. Reg. at 5270. To shift to a federal practice, which the IFR would require many Plaintiffs to do to fulfill their missions, would require a fundamental reorientation in their attorneys' work and training, and would cause direct financial injury, given that some grants they receive cannot support federal court practice. *See* Brown Decl. ¶ 15; Mayer-Salins ¶¶ 17–18; St. John Decl. ¶ 102. Even among Plaintiffs who have greater experience practicing before federal courts of appeals, the IFR's upending of the appellate structure that has been in place for decades engendered reliance interests that the APA required Defendants to consider. S*ee* St. John Decl. ¶ 82 ("The massive increase in the number of PFRs that will be required under the Rule will interfere with FIRRPs current core work by shifting focus of our daily practice from being primarily before the agency – both EOIR and the BIA – to needing a much more significant presence before the Ninth Circuit Court of Appeals.").

Defendants further claim that because there is no "right to a merits adjudication of any appeal in the first instance," the IFR does not undermine reliance interests. 91 Fed. Reg. at 5,272. But whether noncitizens are entitled to a merits adjudication is beside the point. Through the IFR,

the Defendants are clearly changing course by eliminating a previous appeal right and therefore reversing a "longstanding polic[y]" that "engendered serious reliance interests that must be taken into account." *Encino Motorcars*, 579 U.S. at 212. Defendants' failure to consider those interests was arbitrary and capricious.

4. Defendants relied on erroneous data

Defendants compound their errors by relying on faulty data. They assert that the Board "rarely sustains a party's appeal on the merits" and cite data that it "sustained only 123 out of 55,065 case appeals (excluding interlocutory appeals, bond appeals, and appeals of motion to reopen decisions) on the merits" in a two-year period from 2023 through 2025. 91 Fed. Reg. at 5,270 n.8. These assertions, however, are incorrect. A review of publicly available unpublished BIA decisions issued during the specified time period indicates that the BIA actually sustained (*i.e.*, found for the appealing party) more than 450 appeals between October 1, 2023, and December 31, 2024. *See* Ex. F, Comment from Former Appellate Immigration Judges in Opposition to RIN 1125-AB37/EOIR Docket No. EOIR-26-AB37 at 3 (filed Feb. 25, 2026). Defendants thus dramatically understate the frequency with which the BIA reverses IJ decisions. As explained by former IJs and appellate IJs who commented on the IFR, Defendants' apparent reliance on a single internal BIA code as a proxy for success on the merits of an appeal failed to capture multiple scenarios in which the BIA agreed with the appellant but coded the decision differently. S*ee id.* at 2–4 (explaining that a "sustained" appeal may also be remanded on certain issues and likely to be excluded from a search of decisions for "sustained" only). As such, Defendants rely on faulty data. That renders their use of the data to justify the profound changes to the BIA arbitrary and capricious. *See Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56–57 (D.C. Cir. 2015) ("[A]gencies do not have free rein to use inaccurate data."); *City of New Orleans v. S.E.C.*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) ("[R]eliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data 'is arbitrary agency action, and the findings based on [such a] study are unsupported by substantial evidence.'").

5. Defendants failed to consider the impact of the IFR on the courts of appeals

Defendants' lack of meaningful consideration of how summary dismissals and the truncated appeals period will impact the dockets of the courts of appeals is arbitrary and capricious. While Defendants acknowledge that the IFR's "goal is to increase the number of appeal decisions issued per year, which will potentially lead to an increase in the number of petitions for review filed each year," it dismisses such concerns as "not outweigh[ing] the Department's interest in timely adjudications." 91 Fed. Reg. at 5,271 n.11. And it altogether ignores that the IFR strips the BIA of its ability to correct IJ errors below by requiring parties to make their whole case without a "complete record" of removal proceedings, 8 U.S.C. §1229a(b)(4)(C), and ensuring that summary dismissal decisions under the IFR will be made before the record is complete and available for review. *See supra* at 21-22. That, in turn, interferes with an individual's ability to mount a challenge to the proceedings that were conducted before the IJ on a petition for review in the federal courts, the only remaining available mechanism for error-correction under the IFR. S*ee* St. John Decl. ¶ 78 (noting that it is unclear what will happen when the Court of Appeals orders production of certified administrative record when the BIA has summarily dismissed the case without production of the record below). As explained above, combined with the IFR's "waiver" requirement, this means that if and when a litigant gets to the court of appeals, many of the claims they could have raised before the BIA will be deemed waived by the courts of appeals. 91 Fed. Reg. at 5,278. The IFR completely ignores this problem. Defendants' explanation also ignores evidence that petitions for review inundated the courts of appeals following similar, but less drastic, changes to BIA review in 2002. *See* Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 Nw. J. L. & Soc. Pol'y. 1, 5 (2012), https://perma.cc/8DH3-DE7Z (describing an "unrefuted cause-and-effect relationship" between 2002 BIA "streamlining regulations" and a surge in immigration petitions for review at the circuit courts of appeals). By neutering the BIA's function as an intermediate appellate body that could

have identified and corrected errors below and clarified legal issues, the IFR will inevitably push more of that work onto the courts of appeals.

6. Defendants failed to consider reasonable alternatives

Defendants' primary justification for the sudden decision to gut BIA review is the backlog in pending cases and a desire to increase efficiency. Notwithstanding that goal, the APA required them to consider reasonable alternatives. *See Spirit Airlines, Inc. v. United States Dep't of Transportation & Fed. Aviation Admin.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) ("To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses."). Here, Defendants' failure to consider reasonable alternatives further illustrates their lack of reasoned decisionmaking. One readily apparent reasonable alternative was to increase the size of the BIA, which Defendants recently reduced from 28 to 15 members. *See* 91 Fed. Reg. at 5,270. Another was to consider recommendations that had been put forth by a report EOIR had commissioned to address the backlog of cases at EOIR—a report that Defendants do not even mention in their rulemaking. *See Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919, 963 (N.D. Cal. 2021) (describing the report and concluding that Defendants' failure to consider the report in their 2020 rulemaking was arbitrary and capricious). For example, that report directly addressed an issue relevant to the IFR—how to make appeals more efficient, recommending that the BIA would be more effective if IJs were required to issue written, rather than oral, decisions. *See id.* at 965 n.34 ("The Report found that limitations inherent in oral decisions make it difficult for respondents, BIA and circuit courts to examine the IJ's reasoning upon appeal in complicated cases and the Report recommended implementing processes to increase the issuance of written decisions." (cleaned up)). But the IFR fails to address the continued frequent usage of oral decisions and instead requires noncitizens to notice appeals before ever seeing the transcript of the oral decision. And that is but one of the many recommendations the EOIR-commissioned report made that this rulemaking failed to acknowledge, let alone address. *See id.* at 963 ("Here, for reasons that are unexplained, EOIR apparently chose to exclude from consideration in its rulemaking process a

report that presented significant alternatives to the course it ultimately chose to improve efficiency and reduce the case backlog in the immigration court system. This approach does not comport with the APA.").

II. The IFR Irreparably Harms Plaintiffs, and Plaintiffs Have Standing to Challenge It

Plaintiffs have demonstrated "certain and great, actual and not theoretical, and . . . imminent" irreparable harm because, absent a stay, the IFR will "perceptibly impair[]" their programs. *League of Women Voters v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016) (citation omitted). And Plaintiffs did not engage "in activities simply to create an injury"; rather, the IFR "directly conflict[s] with" Plaintiffs' core work. *Id.* (citation omitted).

Plaintiffs also demonstrate a substantial likelihood of standing. If the IFR takes effect, they will be saddled with "the type of 'substantial, tangible costs' that are cognizable for purposes of organizational standing." *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs*., 496 F. Supp. 3d 31, 48 (D.D.C. 2020). That is because the IFR "directly affects" Plaintiffs' "core business activities" of providing legal representation and pro se support to individuals facing removal proceedings before EOIR, including before the BIA. *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1564 (2024).

1. Plaintiffs are nonprofit organizations, and legal services, including full representation and pro se support for immigrants appearing before EOIR is at the heart of their work. *See, e.g.*, St. John Decl. ¶¶ 9–10 (articulating FIRRP's focus on representing detained individuals facing removal proceedings); Mayer-Salins Decl. ¶¶ 4–7 (describing Amica's core programs, which support noncitizens in proceedings before EOIR). The IFR substantially impedes this core work.

Default dismissal of all appeals to the BIA. First, as established above, the IFR makes summary dismissal of appeals the default, which will result in final, executable removal orders even where the noncitizen has a strong likelihood of reversal on appeal and a legal right to remain in the United States. *See, e.g.*, Jones Decl. ¶¶ 17–20 ("[T]he BIA detects IJ errors in a majority of BDS merits cases it reviews."); *id.* ¶ 30 (IFR will "result in the deportation of BDS clients who are eligible for immigration relief and status based on IJ decisions that contain legal and factual

errors."). The IFR will harm Plaintiffs because it "will interfere with the[] ability [of legal service providers] to provide essential services to their clients and/or members." *Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 79–80, 81. And it will "immediate[ly] [a]ffect" Plaintiffs' "ability to serve their [existing] clients" and take on new clients. *Id.* at 81–82; *see also CLINIC*, 513 F. Supp. 3d at 175 (same).

In particular, the IFR will require Plaintiffs to take on many more federal court petitions for review (PFR), a much more labor-intensive process. *See, e.g.*, Mayer-Salins Decl. ¶¶ 8, 10 (describing that "hundreds of hours of staff time can go into one PFR," whereas most attorneys spend about "25 to 35 hours on a BIA appeal"). For some Plaintiffs, this is an entirely new body of work that they have limited or zero capacity to handle. *See, e.g.*, Brown Decl. ¶ 11 (HIAS has only filed one PFR in declarant's tenure, which required outside support); St. John Decl. ¶¶ 81–82 (FIRRP has only 2 staff members with PFR expertise, describing federal court appeals "an entirely different beast" than the BIA that "requires a different skill set, expertise, and workflow").

Moreover, many of Plaintiffs' existing funding streams are for agency level work and cannot be used to file petitions for review where the U.S. government is the opposing party. *See, e.g.*, Jones Decl. ¶¶ 28–29 (explaining that BDS has no full-time PFR attorneys and relies on collaboration with law school clinics and pro bono partners); Mayer-Salins Decl. ¶ 18 (explaining that its grants to serve individuals deemed incompetent by an IJ do not allow Amica to bill for PFRs).

Detailed notices of appeal within 10 days. Next, the IFR's presumption of dismissal, when coupled with the compressed timeline and waiver of any issue omitted from the notice makes the process of preparing a Notice of Appeal much more time consuming and onerous. Now, Plaintiffs will have to undertake full case investigation, legal research, and full briefing of the issues in just 10 days, often without access to any written record of the underlying proceeding. St. John Decl. ¶ 59; Mayer-Salins Decl. ¶¶ 30–31; Brown Decl. ¶¶ 18–19. None of that additional work would have been required absent the IFR. In fact, this new work will begin even while cases are pending before the IJs because it will be necessary to enable Plaintiffs to have sufficient information to

competently file a Notice of Appeal. *See* Mayer-Salins Decl. ¶ 31; *see* Koop Decl. ¶ 34. These extra steps add up to hours of additional work to achieve the same task, which means Plaintiffs will have to serve fewer people, undermining their core work. *See, e.g.*, Koop Decl. ¶¶ 9, 40–42, 47, 79; St. John Decl. ¶¶ 15, 55, 59; Mayer-Salins Decl. ¶¶ 28, 30-31; Brown Decl. ¶¶ 18–19, 21–23.

New work caused by increased uncertainty. Uncertainties created by the IFR also limit Plaintiffs' ability to assist people through the appeal process. The IFR is silent as to what types of cases will be referred for full consideration on the merits. For Plaintiffs, this uncertainty translates into an inability to appropriately plan as to how to use their limited resources. Brown Decl. ¶ 40 (the IFR "does not articulate what factors the BIA will consider that favor accepting an appeal, and so HIAS attorneys will have to simply guess what might entice the BIA to accept its appeal"). Simply put, if the IFR takes effect, Plaintiffs will face immediate decisions about whether to accept a new case for removal defense before the IJ or help an existing client with an appeal, but they will lack critical information necessary to make that assessment. Koop Decl. ¶ 30; Jones Dec. ¶ 22.

Similarly, the existence of two different deadlines for a single appeal will create additional uncertainty that attorneys must do extra work to navigate. *See, e.g.*, St. John Decl. ¶ 34 ("As a lawyer with 15 years of experience in immigration law and appellate practice, it is unclear from the text of the Rule how the BIA will treat" cases that have some issues subject to the 30-day deadline and others subject to the 10-day deadline.); Mayer-Salins Decl. ¶ 24 (explaining that Amica would need to advise litigants to assume the deadline is 10 days due to the ambiguity and to avoid errors by the BIA clerk); Koop Decl. ¶¶ 43–47.

Harm flowing from expedited briefing schedules with no opportunity for extension. Fourth, for the rare case that is accepted for merits consideration, the IFR's timelines will again reduce Plaintiffs' capacity, hindering their core obligations of serving noncitizens. *See, e.g.*, Jones Decl. ¶ 48 (shortened briefing schedule would make it significantly more difficult for BDS staff sufficient time to draft ethically responsible BIA briefs while maintaining their current caseload . . . and would therefore require that BDS take on fewer new clients."); Koop Decl. ¶ 80 ("NIJC

staff—overall—will be more limited in appellate representation capacity because we will have to preserve capacity amongst staff to address briefing in an unknown timeframe."); St. John Decl. ¶ 88 (changing in briefing timelines "will reduce how many people FIRRP can represent on appeal").

This result is inevitable because, as discussed, the IFR does not allow Plaintiffs' attorneys to point to their case or personal obligations in support of an extension, and the IFR does not specify a timeline for when a briefing schedule will issue. 91 Fed. Reg. at 5,277–78. The result will be a series of rolling emergencies, rendering Plaintiffs able to serve fewer clients. *See, e.g.*, St. John Decl. ¶¶ 23, 84–85487, 98 (explaining how the briefing schedule changes will limit the number of appeals they can competently work on, particularly given that the BIA is entirely unpredictable regarding when it will issue a briefing deadline); Mayer-Salins Decl. ¶ 32 (referencing a need to "dramatically reduced caseloads or constantly reassigned cases …[to] address the series of emergencies this IFR creates"); Koop Decl. ¶¶ 49–57 (same); Brown Decl. ¶¶ 42–44 (same).

Impeding ability to assist pro se and detained people. Multiple Plaintiffs have specific programs designed to serve pro se individuals. The IFR's changes will have a particularly dire impact on these core programs. Indeed, in many cases, Plaintiffs will not have the ability to speak to a pro se person before the 10-day appeal deadline passes, much less help them prepare for the newly cumbersome process of filing an appeal. For example, Plaintiff FIRRP has a long history of providing pro se support to detained individuals through the immigration court process. St. John Decl. ¶ 18. The IFR's changes will make the information and resources needed to mount a successful BIA appeal completely out of reach for most detained individuals. *Id.* ¶ 39 (discussing the lack of internet access for detained individuals); Koop Decl. ¶ 38 (describing challenges in getting even a phone call with a detained person in time to mount an appeal); Mayer-Salins Decl. ¶¶ 22–23 (describing how at many detention facilities, it takes litigants more than 10-days to receive mail, including a written IJ decision).

And, even if a pro se person is able to overcome some of the technical and logistical challenges that the IFR creates, the IFR will nonetheless substantially impair Plaintiffs' ability to

provide pro se support through the appellate process. Staff will not be able to know the details necessary for sufficient completion of a person's Notice of Appeal; indeed, the attorneys may not even understand the applicable timeline because asylum claims are subject to the 10-day deadline for some things and a 30-day deadline for others. In the likely event that a pro se person has trouble explaining the IJ's decision, staff will have to guess the relevant deadline. Koop Decl. ¶ 45; *see also* Brown Decl. ¶ 26 ("To be safe, then, HIAS attorneys would need to presume that all potential appeal clients face a ten-day filing deadline, . . . leading to cascading effects on our capacity to work on other clients' cases."); St. John Decl. ¶ 55 (explaining how lack of information impedes the case-acceptance process).

For Plaintiffs who worked to take on full representation at the BIA for previously pro se individuals, that stream of work is likely to become impossible. Mayer-Salins Decl. ¶¶ 26–27 (describing administrative challenges to accessing the audio recording when an attorney starts representation after an IJ ruling and how, even now, pro se litigants have "slim chances" of finding an attorney to represent them on appeal); Koop Decl. ¶¶ 40, 42 (explaining the difficult ethical issues of advising a client on a serious issue in that short-time frame, often without critical information needed to advise the client of the strength of their case); St. John Decl. ¶¶ 55–56 (noting that the administrative steps alone of taking on a client's appeal, "[e]ven if accelerated to the maximum extent," would leave an attorney with, "at best, half of the 10-days available to actually prepare the Notice of Appeal"); Brown Decl. ¶ 25 ("[U]nder the new ten-day filing deadline, most potential clients likely would not reach us in time for us to assist them.").

Hindering pro bono programs for BIA representation. The IFR will likewise reduce Plaintiffs' ability to rely on their pro bono and volunteer programs, which significantly augment the number of noncitizens that they can serve. *See* St. John Decl. ¶ 15; Brown Decl. ¶ 8. Specifically, it will be extremely difficult for Plaintiffs to recruit, refer, and train pro bono attorneys to represent noncitizens on appeal in the timeline imposed by the IFR. *See* Koop Decl. ¶¶ 50–51, 55–56, 80 (explaining that, due in part to firms' conflict and case acceptance processes and because of many pro bono attorneys' lack of familiarity with immigration law and processes,

placing a case under the IFR's briefing timeline will be "impossible"); Mayer-Salins Decl. ¶ 33 (explaining that Amica would not have enough time to find a law firm and for the law firm to check conflicts and review their training on BIA practices); St. John Decl. ¶¶ 86–88 (explaining how the combined impact of a shortened briefing schedule, limited opportunities for extensions, and no chance to review the record in advance will make it more difficult to place pro bono BIA appeals). As such, it will be harder to place pro bono cases and more work will fall on in-house staff at the same time their capacity is being squeezed by the IFR. Indeed, NIJC has already had to cancel a pilot pro bono program in anticipation of the barriers that this IFR will create. *See* Koop Decl. ¶ 82. And even for cases where the pro bono attorney handled the case before an IJ, it will likely be impossible to carry on with the appellate process under the IFR's new parameters. Koop Decl. ¶¶ 51, 55–56. As a result, Plaintiffs' ability to serve their existing clients will be hindered, and their capacity to take on new clients will be sharply reduced.

All told, the IFR upends access to a full and just removal process with every provision it enacts. Plaintiffs are committed to ensuring the fairness of immigration proceedings for as many noncitizens as possible, but the IFR puts fundamental fairness out of reach for many. *See, e.g.*, Koop Decl. ¶ 86 (summarizing how the IFR frustrates NIJC's core mission to ensure that "all immigrants receive a fair day in court"); St. John Decl. ¶ 14 ("[T]his [IFR] will result in an inability to perform FIRRP's core services and will have a tremendously detrimental impact on the people we serve."); Mayer-Salins Decl. ¶ 35 (explaining how the IFR will make "merits review before the BIA [] non-existent for nearly all of our clients"). By doing so, the IFR directly diminishes Plaintiffs' ability to provide representation in these critical cases. *See League of Women Voters*, 838 F.3d at 9 (where "new obstacles unquestionably make it more difficult for the [plaintiff organizations] to accomplish their primary mission . . . they provide injury for purposes both of standing and irreparable harm"); *CLINIC*, 513 F. Supp. 3d at 175 (finding irreparable harm where rule "increase[es] the amount of work required per case[,] therefore limiting [the organization's] transformative impact by decreasing the number of individuals [it] can serve" (alteration in original)).

2. In addition to the injuries described above, all of which establish both organizational standing and irreparable harm, Plaintiffs can also point to a financial injury, which establishes injury-in-fact, apart from an organizational standing theory. *See, e.g.*, *Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 46–48; *CLINIC*, 513 F. Supp. 3d at 175.

Plaintiffs receive funding from a variety of sources and, in some instances, Plaintiffs' metrics for receiving funding are tied to number of individuals served. Koop Decl. ¶ 81 (explaining that much of NIJC's funding is based on accepting and filing new cases to meet certain funder deliverables); Mayer-Salins Decl. ¶ 18 (explaining that one grant "requires [its] largest bucket of deliverables to be representation in administrative proceedings"); *accord* Jones Decl. ¶¶ 10; St. John Decl. ¶¶ 96–97, 100; Brown Decl. ¶¶ 12, 31. If the IFR is permitted to take effect, Plaintiffs will see an immediate drop in their capacity to take cases before EOIR and in the number of pro se individuals they are able to assist. Those changes will have a direct impact on funding because Plaintiffs will no longer be able to serve the number of people that their grants require.

And, as mentioned, much of the substantive work of representing noncitizens on appeal will now shift to the federal courts of appeals. Some Plaintiffs have no funding for such work, and others have only limited funding for such representation. Plaintiffs will not be able to rely on existing funding to do the same work (appealing errors from the IJs) because they will have to do so in a different venue (before the circuit courts and not the BIA). *See, e.g.*, St. John Decl. ¶ 100 (noting that funding through the National Qualified Representative Program (NQRP) extends to BIA appeals but not PFRs); Koop Decl. ¶ 79; Mayer-Salins Decl. ¶¶ 18–19. "These concrete drains on resources are the type of substantial, tangible costs that are cognizable for purposes of organizational standing" and irreparable harm. *CLINIC*, 513 F. Supp. 3d at 170 (cleaned up).

III. The Balance of Equities and the Public Interest Favors a Stay

The final two 705 stay factors—balancing the equities and weighing the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, Plaintiffs' strong likelihood of success on the merits, *supra* Part I, itself establishes that the equities and public interest favor preliminary relief. "It is well established that the Government

cannot suffer harm from an injunction that merely ends an unlawful practice." *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 218 (D.D.C. 2020) (internal quotation marks omitted). Rather, "there is a substantial public interest in having governmental agencies abide by the federal laws . . . that govern their existence and operations." *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017) (internal quotation marks omitted). There is therefore "generally no public interest in the perpetuation of unlawful agency action." *Id.* (internal quotation marks omitted). And "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009).

Plaintiffs and their clients, however, will suffer critical harm if the IFR takes effect. As explained above, the IFR strains the resources and capacity of Plaintiffs—limiting the number of noncitizens they can effectively serve—and will thwart meritorious claims for relief. The result is that many noncitizens will face unjust removal from the country and be sent to countries where they will potentially face persecution and the threats of physical violence. And there is undoubtedly "a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436

On the other side of the balance, Defendants' "only harm is that it will be required to keep in place" the long-standing immigration court and BIA procedures that pre-date the IFR "while judicial review of its new regulation runs its course." *Dist. of Columbia*, 444 F. Supp. 3d at 45. "That hardship pales in comparison to the injuries asserted by the plaintiffs." *Id*. Staying the IFR until the Court can determine its lawfulness merely "preserve[s] the relative positions of the parties" as they existed prior to the IFR's March 9, 2026, effective date. *Robertson v. Cartinhour*, 429 F. App'x 1, 2 (D.C. Cir. 2011) (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should stay the effective date of the IFR under Section 705 pending the resolution of these proceedings.

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Respectfully submitted,

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